No. 84-1360

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1984

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THE CITY OF RENTON, *et al.*,
*Appellants,*

v.

PLAYTIME THEATRES, INC.,
a Washington corporation, *et al.*,
*Appellees.*

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**On Appeal from the United States Court of Appeals for the Ninth Circuit**

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## BRIEF FOR APPELLANTS

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## QUESTIONS PRESENTED

Renton, Washington, is a small city (pop. 32,200) located just outside of Seattle. Prior to the entry or attempted entry of any adult motion picture theatre, the City enacted a zoning ordinance, fashioned after those adopted and judicially approved in Seattle and Detroit, which effectively set aside 520 acres of developing commercial area for the operation of such theatres.* The questions are:

1. May a small city, in enacting a zoning ordinance regulating the location of adult theatres prior to the entry of such theatres, rely upon the experience of other, larger cities regarding the theatres' secondary adverse impact upon residents, schools, churches and businesses, or is a city required, under the First Amendment to the Constitution, to await the theatres' entry and consequent deleterious effects before zoning the impacted area?

2. Where a small city effectively sets aside a significant area of the city for the location of adult theatres, is its ordinance in violation of the First Amendment because a portion of the set-aside area either is presently undeveloped, or is presently developed for existing commercial purposes?

3. Where the intent of a city council in regulating the location of adult theatres is not improperly related to the content of adult films or the suppression of First Amendment rights, and instead is related to such values as preserving commercial areas and family-related neighborhoods, is its regulation constitutionally void because some citizens at a public hearing voiced criticism of film content?

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* The Questions Presented are set forth verbatim as they appeared in the Jurisdictional Statement. As the Jurisdictional Statement, the Reply Brief and this Brief make clear, the set-aside zone was comprised of about 400 acres prior to the entry of any adult theatre, and an additional 120 acres were effectively added thereafter.

## PARTIES TO THE PROCEEDINGS

In addition to the City of Renton, the following are Appellants in this Court: Barbara Y. Shinpoch, Mayor of Renton; Earl Clymer, Robert Hughes, Nancy Mathews, John Reed, Randy Rockhill, Richard Stredicke, and Tom Trimm, members of the Renton City Council; and Alan Wallis, Chief of Police of the City of Renton.

Kukio Bay Properties, Inc.,** and Playtime Theatres, Inc., both Washington corporations, are Appellees before this Court.

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** Since the completion of the proceedings below, Kukio Bay Properties, Inc., has changed its name to Sea-First Properties, Inc. To avoid confusion we will continue to refer to Kukio by its original name, which was the one used in the testimony, briefs, and opinions below.

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## BRIEF FOR APPELLANTS

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### OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, from which this appeal is taken, was rendered on November 28, 1984. It appears at 748 F.2d 527 and has been reprinted as Appendix A to the Jurisdictional Statement ("App.") at 1a. The United States District Court for the Western District of Washington rendered several opinions and orders in this case, none of which has been officially reported. Its rulings are reprinted as Appendices B-E and G-H to the Jurisdictional Statement (App. 23a, 33a, 34a, 35a, 46a, 48a).

## JURISDICTION

This action was brought by Appellees in the United States District Court for the Western District of Washington seeking, *inter alia*, declaratory and injunctive relief against the enforcement of Renton's zoning ordinance governing the permissible location of adult theatres. Jurisdiction in the District Court was based on 28 U.S.C. §§ 1331, 1343(3) and 2202. The District Court denied the requested relief.

On November 28, 1984, the United States Court of Appeals for the Ninth Circuit reversed the trial court and held Renton's zoning ordinances in violation of the First Amendment to the United States Constitution. Appellants' Notice of Appeal was filed in the Ninth Circuit on February 6, 1985 (App. 55a). Jurisdiction lies in this Court under 28 U.S.C. § 1254(2). *New Orleans* v. *Dukes*, 427 U.S. 297, 301 (1976); *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922, 927 n.2 (1975). This Court noted probable jurisdiction on April 15, 1985.[1]

## CONSTITUTIONAL PROVISIONS AND ORDINANCES INVOLVED

The First Amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law * * * abridging the freedom of speech, or of the press * * *.

The full text of Renton Ordinances 3526, 3629 and 3637 is set forth in the Appendix to the Jurisdictional Statement at 78a-98a.

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[1] Neither court below certified to the Washington Attorney General the fact that the constitutionality of the Renton Ordinance was drawn into question and that 28 U.S.C. § 2403(b) may be applicable. Pursuant to Rule 28.4(c) of this Court, Appellants served three copies of their Jurisdictional Statement upon the Attorney General of the State of Washington.



## STATEMENT OF THE CASE

In mid-1980, the City of Renton, Washington, prompted in part by a seminal decision of this Court and by a later one of the Supreme Court of Washington, began to address the problem of "adult uses", even though no such uses had yet been established in the City.[2]

The seminal decision of this Court was *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50 (1976), in which it was held that the City of Detroit could use the secondary effects of theatres showing sexually explicit "adult" movies as a basis for placing those theatres into restricted areas in an attempt to preserve the "quality of urban life" and in furtherance of the "city's interest in preserving the character of its neighborhoods" (*id.* at 71; plurality opinion). The zoning ordinances in Detroit (App. 99a, 113a, 118a) required already existing adult theatres (as well as those that would be purchased or built thereafter) to be dispersed—that is, they could not be located within 1,000 feet of any two other "regulated uses" or within 500 feet of a residential area (427 U.S. at 52).

Four years later, the Supreme Court of Washington, sitting *en banc*, unanimously upheld two zoning ordinances (App. 126a, 138a) that required adult theatres to be located in certain downtown areas of Seattle. *Northend Cinema, Inc.* v. *City of Seattle*, 90 Wash. 2d 709, 585 P.2d 1153 (1978).[3] Reciting extensive studies demonstrating the problems created by such theatres in residential and commercial areas, the court held that the ordinances were valid under *Young*. The residents of Seattle had expressed concerns about the attraction of transients, parking and traffic problems, increased crime,

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[2] In fact, there are no other adult uses in Renton even today, other than the adult use that is the subject of this lawsuit. *See* Joint Appendix ("JA") at 174.

[3] Appellee Playtime Theatres, Inc., was one of the unsuccessful litigants in *Northend Cinema*.

decreasing property values, and interference with parental responsibilities toward children. "In short, the goal of the City in amending its zoning code was to preserve the character and quality of residential life in its neighborhoods * * *. A second and related goal * * * was to protect neighborhood children from increased safety hazards, and [the] offensive and dehumanizing influence created by [the] location of adult movie theatres in residential areas" (585 P.2d at 1155).

The effect of the Seattle restrictions was to force adult theatres into an area consisting of approximately 250 acres (or less than 1% of the city's acreage) (*id.* at 1156). Noting that this Court had approved the "concentration" as well as the "dispersal" method of zoning theatres in *Young*, the Washington Supreme Court ruled that Seattle's planning effort "must be accorded a sufficient degree of flexibility for experimentation and innovation" (*id.* at 1159). This Court denied certiorari in the case (441 U.S. 946 (1979)).

Appellant Renton, Washington, is a small city, with a 1981 population of 32,200 (JA 25), whose northern border is approximately one mile from the southern border of Seattle. In fact, Appellees' president considers Renton "the South End of Seattle" (JA 336-337, 348). Renton covers 15.3 square miles, or approximately 9635 acres, of which 2025 are occupied by single-family residences, another 415 by multi-family residences, 385 by commercial uses, and 500 by parks and recreational areas (JA 26). It has only three theatres in the whole city. The residential and business areas are in all instances located in close proximity to one another, and the shopping and commercial areas, including four large shopping clusters, are dispersed throughout the City (JA 26, 42). Multi-family residences adjoin the two downtown theatres that were ultimately purchased by Appellees (JA 261). The Renton School District includes fourteen elementary schools, three middle schools, three high



schools, and a vocational school (JA 26). There are 18 parks and 62 churches in Renton (*id.*).

Despite the *Young* and *Northend Cinema* decisions, other cities in the United States were beginning to have difficulty fashioning zoning ordinances that would adequately deal with the deleterious effects of adult uses and at the same time meet constitutional challenges in the courts.[4] Therefore, Renton's mayor suggested that the problem be addressed in Renton *before* it developed in that city (JA 411). The City Council agreed, and the matter was referred to the Planning and Development Committee ("PDC") for study (JA 38).

The PDC was writing on a clean slate insofar as Renton was concerned, because more than a year and a half would pass before anyone even attempted to purchase, lease or build an adult use facility in the City (JA 74, 174; App. 60a). But the PDC had the experience of other cities to guide it. After some study, the PDC recommended that the matter of adult uses be referred to the Planning Commission, and the City Council agreed (JA 39-40). A moratorium on licensing adult uses followed, and the entire problem was then referred back to the PDC (JA 41-44). The PDC itself held at least six public meetings, and at several of them testimony was given by members of the public (JA 27-28, 129-130, 198). In addition, the PDC discussed "on numerous occasions" with the Ways and Means Committee the standards to be used in any proposed zoning ordinance (JA 179). The PDC also received a comprehensive report from the City Attorney's Office, members of which constantly advised as to what had occurred in other cities (JA 27, 108-110, 181).

By March 1981, the issue was no longer adult uses in general but adult film theatres in particular. A public

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[4] *See* Jurisdictional Statement ("Juris. State.") at 11-13.

meeting of the PDC was held on this subject on March 5, 1981, attended by 64 citizens, 28 of whom gave testimony (JA 27, 185-186). Included among the witnesses was the Superintendent of Schools, who stressed the "negative impact upon elementary school children walking to and from school" and children "walking or being in the vicinity of those types of land uses going and coming from school" (JA 32-33, 72, 131-133). The head of the local Chamber of Commerce testified "as to the economic adverse effects of the adult theatre use in the City of Renton" (JA 71). He noted that "adult entertainment land uses * * * could [] adversely affect business practices, property values within the City * * *" (JA 133).

There was testimony of great diversity at these various meetings.[5] Several speakers, for example, noted the adverse impact caused by adult theatres on "neighborhoods and businesses" (JA 27-28) and on real property values, including a depreciation in such values (JA 28, 76, 77, 192). One citizen spoke about the adverse effect on the business welfare of the community (JA 72). Others spoke about the vitality, economic health, and business welfare of the City, creating a concern about the "protection of residential neighborhoods of the City of Renton from potential adverse effects of adult entertainment" (JA 72-73). There was evidence, for example, that businesses in Milpitas, California, had experienced reduced trade as a result of a nearby adult book store (JA 174). Witnesses also expressed concern about the secondary adverse impact upon children, including their character and moral fiber, as well as the difficulty of properly teach-

[5] No formal record was made of all of these meetings, but Renton's Policy Development Director, who was present at virtually all of them, testified as to what occurred (JA 70-71, 109, 111, 130-131).



ing children, with people "going and coming from the theatre" (JA 28, 76, 77, 190-191).

A great deal of concern was expressed about crime, including prostitution and assaults (JA 76, 195). There was testimony at one of the PDC meetings that "there would be an increase" in the crimes of assault and prostitution (JA 172-173), and the synopses of the Seattle and Detroit experiences provided to the PDC suggested such increases (JA 76, 173). There was also testimony that people might not want to go to either parks or churches located in the vicinity of adult theatres (JA 191). Overall, there was grave concern about the effect of "this type of activity upon persons or individuals in the general vicinity of those uses" (JA 70).

In the meantime, the PDC had been looking at the experience of other cities. One of the most important of these, of course, was Seattle, just next door. One or two Seattle residents discussed with the PDC the background of events leading to Seattle's ordinances (JA 195-196), speakers noted the deterioration of neighborhoods in Seattle (JA 28), and the PDC reviewed the Seattle ordinances and the "major conclusions but not the detailed background" of the *Northend Cinema* case as well as an opinion letter on it.[6] The PDC was concerned about the "spinoff effects that would be similar to the Skid Road [Row] impacts" in Seattle (JA 76). More specifically, the concern from the Seattle experience was over the "adverse effects upon the moral character of young people", the "secondary impact of other related * * * potential criminal activity and activities of that type", and the "potential adverse impact on property values in the immediate vicinity of those types of uses" (JA 76).

This Court's findings and decision in *Young* were reviewed (JA 75), as well as a zoning and planning law report relating to that case (JA 167). In addition, the

[6] JA 74-75, 167-168, 170, 267-268; *see also* JA 71.

PDC looked at "detailed examples" from Tacoma and other cities (JA 29). In fact, "numerous cities' approaches" were considered (JA 167-168)—a lawsuit in Des Moines, for example, was discussed (JA 169-170).[7] Several persons from Tacoma testified before the PDC about their concerns when Tacoma's general fare theatre converted to adult fare (JA 195-197). Boston's "combat zone" and the regulatory approach in Marysville, Washington, were discussed (JA 167, 197), and testimony about property values in a case from Milpitas, California, was considered (JA 174). Renton's Policy Development Director was familiar with and discussed the Milpitas situation, having worked on city planning there for seven years (JA 56, 104-105).

After months of study, the PDC recommended to the City Council that the matter of adult theatre uses be referred to the Ways and Means Committee for the drafting of an appropriate ordinance (JA 47). The PDC concluded that the areas of most concern were the "protection and preservation of its [Renton's] residential areas and the accessory land uses such as schools, parks, churches and other public and quasi-public land uses" (JA 29). The City Council agreed (JA 48), and on April 13, 1981—almost a year after the matter was first taken up—the City Council adopted by a vote of 5-to-1 Ordinance No. 3526 (App. 78a). As one *amicus* has pointed out, this ordinance was part of a comprehensive city plan going back 15 years, one purpose of which was to limit commercial exploitation in a way that was not harmful to the community.[8] All of the normal pro-

[7] The experience of other cities was clearly relevant. Playtime's president admitted, for example, that Renton is a similar market to Spokane for adult films, playing to "roughly the same kind of market"; "Spokane would be a comparable market to this [Renton] area" (JA 348; *see also* 372-373).

[8] Brief *Amicus Curiae* of the National League of Cities, *et al.*, in support of Jurisdictional Statement, at 2-3, incl. n.2.



cedures for committee and City Council meetings had been followed in dealing with adult theatre uses (JA 129-130, 178-179, 185-186).

Ordinance 3526 defined an "adult motion picture theatre" in terms of a building "used for" the exhibition of visual media depicting "Specified Sexual Activities" and "Specified Anatomical Areas" (App. 78a), which were defined in detail.[9] It prohibited such theatres from locating within 1,000 feet of any residential area, church, park, or religious facility or institution, or within one mile of any school.[10] The ordinance's definition of "adult motion picture theatre" was modeled after, and was virtually identical to, the definitions in the ordinances

[9] These definitions were as follows:

> 1. "Adult Motion Picture Theater": An enclosed building used for presenting motion picture films, video cassettes, cable television, or any other such visual media, distinguished or characterized by an emphasis on matter depicting, describing or relating to "specified sexual activiites" or "specified anatomical areas" as hereafter defined, for observation by patrons therein.
>
> 2. "Specified Sexual Activities":
>
> (a) Human genitals in a state of sexual stimulation or arousal;
>
> (b) Acts of human masturbation, sexual intercourse or sodomy;
>
> (c) Fondling or other erotic touching of human genitals, pubic region, buttock or female breast.
>
> 3. "Specified Anatomical Areas":
>
> (a) Less than completely and opaquely covered human genitals, pubic region, buttock, and female breast below a point immediately above the top of the areola; and
>
> (b) Human male genitals in a discernible turgid state, even if completely and opaquely covered. [App. 78a-79a.]

[10] One mile was chosen because it was the "minimum student walking distance" (JA 47) and because busing was provided to elementary school students located more than one mile from their schools (JA 28).

that had been approved in *Young* and *Northend Cinema* (*see* App. 99a-139a, where the relevant portions of the Detroit and Seattle ordinances are set forth in their entirety).

Roger H. Forbes was the president, sole officer, sole director, and sole stockholder of Appellees Playtime Theatres, Inc., and Kukio Bay Properties, Inc.[11] Kukio owned 10 theatres in eight cities and leased all of them to Playtime.[12] They all showed sexually explicit films (JA 307-312). Kukio and Playtime both had their main offices in Seattle, but Playtime's adult film-buying service was Pussycat Theatres, the dominant adult theatre circuit in California.[13] In January 1982, some nine months after Renton had enacted its ordinance, Forbes began making plans to have Kukio acquire and lease to Playtime two existing theatres in downtown Renton, at least one of which Forbes intended to operate as a theatre showing sexually explicit films.[14] He first inquired as to whether Renton had an adult zoning ordinance and obtained a copy of the ordinance (JA 368). Playtime and Kukio then filed a Complaint in the United States District Court for the Western District of Washington on January 20, 1982, seeking a preliminary injunction against enforcement of the ordinance (JA 1). This was

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[11] JA 296-297, 303, 304, 316-319, 323, 361-362.

[12] JA 300. All but one of these cities were in the State of Washington: Seattle, Spokane, Tacoma, Bremerton, Pasco, Point Roberts and Redmond. The other was in Portland, Oregon (*id.*). All 10 theatres were profitable (JA 379-380). Playtime recirculated its adult films throughout all of its theatres (JA 403).

[13] JA 297, 302-303, 304-305, 316, 318, 365.

[14] JA 328-329, 339; *see also* JA 306; App. 60a-61a. Among the films Forbes intended to show in Renton were "Deep Throat" and "The Devil in Miss Jones" (JA 349, 367), and these were, in fact, the first two films shown in the City when Playtime commenced exhibiting adult film fare.



followed by a motion for a temporary restraining order ("TRO"), which was referred to a Magistrate (JA 2).

Four days later, on January 26, 1982, Kukio purchased the two theatres, and the next day it leased them to Playtime (App. 60a). Within a few days, affidavits were filed by both sides in support of their respective positions (JA 3, 25, 32, 34), and Renton's Policy Development Director testified before the Magistrate on the application for the TRO (JA 53).[15] The Magistrate recommended against the entry of a TRO (App. 49a), and Kukio and Playtime then filed an Amended Complaint (App. 57a)[16] alleging that Renton's ordinance was unconstitutional on its face and as applied to plaintiffs under, among other things, the First and Fourteenth Amendments, and that it was not susceptible of a constitutional construction (App. 68a-69a). They sought, *inter alia*, a declaratory judgment and a preliminary and permanent injunction (App. 75a-76a). Kukio and Playtime (hereinafter collectively "Playtime") conceded that at least one of their theatres would "continuously operate exhibiting adult motion film fare to an adult public audience * * *."[17]

The District Court adopted the Magistrate's recommendation and denied Playtime's motion for a TRO

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[15] As explained in n.53 *infra*, the short time period between the filing of the Complaint and the TRO hearing resulted in several maps being filed which were simply in error in setting forth the effect of the ordinance.

[16] There were during this succeeding period several attempts by Renton to have the District Court abstain in favor of a state court, but both courts below held that federal jurisdiction was appropriate (App. 4a, 9a-12a). Even though we believe the courts below were in error in regard to absention (*cf. Huffman* v. *Pursue, Ltd.*, 420 U.S. 592 (1975); *Middlesex County Ethics Committee* v. *Garden State Bar Ass'n*, 457 U.S. 423 (1982)), that issue is not pursued in this appeal.

[17] App. 61a. Playtime's Complaint described these films as "erotic materials which are not otherwise obscene" (App. 62a; *see also* App. 63a, 77a).

(App. 46a, 48a). Two days later, on February 25, 1982, the Renton City Council held a public hearing on the subject of adult theatres, at which it heard testimony from a number of interested citizens (App. 85a). Discovery in the underlying lawsuit proceeded (JA 100, 161, 294), and on May 3, 1982, the City Council passed a second zoning ordinance (No. 3629), amending the prior one. Insofar as relevant here, the amendment (a) spelled out the fact that in passing the prior ordinance, the City Council had relied upon the decisions in *Young* and *Northend Cinema* (App. 81a); (b) summarized the testimony received at the prior PDC public meeting of March 5, 1981 (App. 81a-85a); (c) set forth findings of fact that had formed the basis of the prior ordinance (*id.*); (d) summarized and adopted the testimony received at its own public hearing on February 25, 1982 (App. 85a-86a); (e) defined "used" in the prior ordinance to mean "a continuing course of conduct" (App. 87a);[18] and (f) reduced the restriction on locating adult theatres near schools from one mile to 1,000 feet (App. 87a).[19]

The City Council's findings, which are set forth in full at App. 81a-86a, emphasized that the location of adult theatres in close proximity to residential areas, churches, parks, and schools might lead to increased criminal activities, including prostitution, in such areas; that the location of adult theatres would have a deteriorating effect on the areas of the city in which they were located; and that reasonable regulation of adult

[18] The term "used" was defined as
> a continuing course of conduct of exhibiting "specific [*sic*; specified?] sexual activities" and "specified anatomical areas" in a manner which appeals to a prurient interest. [App. 87a.]

[19] The amendment also declared a state of emergency to exist and included a severability clause and a declaration that a violation of the ordinance was a public nuisance, which was subject to abatement by civil action (App. 88a-89a).



theatre locations would protect the character of the community and its property values while providing access to those who wished to patronize adult theatres.[20] Finally, on June 14, 1982, the City Council, on advice of counsel, adopted a third ordinance (No. 3637) which reenacted Ordinance 3629 without an emergency clause (App. 90a). These three ordinances will hereinafter be referred to collectively as "the ordinance."

By drawing a series of circles around the areas restricted by the original ordinance, one could determine that its effect was to set aside approximately 400 acres, or about 4.1% of the City, within which adult theatres could locate.[21] However, when the second ordinance was adopted, reducing the proscribed distance from schools to 1,000 feet, the set-aside zone was effectively enlarged to 520 acres, or 5.4% of the City (JA 213). This enlarged area, which was highly accessible to Renton residents (JA 257-260), contained "primarily developed, existing commercial development of various types" as well as "areas that are currently undeveloped and in the process of transition to developed uses" (JA 262). The set-aside zone included land "in all stages of development from raw land to developed, improved and occupied office space, warehouse space and industrial space" (JA 213).

After a hearing, the Magistrate submitted a report recommending that Renton's ordinance be held in violation of the First Amendment (App. 37a). The District Court first granted a preliminary injunction and denied Renton's motion for summary judgment (App. 35a). Then, for the first time, Playtime began showing sexually explicit films at one of its two downtown theatres. However, after the parties agreed to submit the case on its

[20] City authorities had recognized during their deliberations that these types of theatres could not be banned from Renton (JA 27).

[21] JA 30, 57, 126, 199.

present record (App. 8a), the District Court denied a permanent injunction and granted summary judgment in favor of Renton (App. 23a, 33a).

The court ruled that Renton's ordinance "in its essential features is virtually identical" to the Detroit and Seattle ordinances, except that the word "used" was more precisely defined in the Renton ordinance (App. 26a-27a). The intrusion into First Amendment interests was not substantial because the ordinance's restrictions were even narrower than those in the Detroit and Seattle ordinances. No theatre had been closed, there was no content limitation, and the availability of 520 acres contradicted the notion of a substantial restriction on protected speech. According to the District Court, the burden of having to locate a theatre within the set-aside area was no different than the burden upon other land users "who must work with what land is available to them in the city" (App. 27a). The trial court ruled that the acreage available to Playtime and other adult theatres was comprised of land "in all stages of development from raw land to developed, industrial, warehouse, office, and shopping space that is criss-crossed by freeways, highways, and roads * * *" (App. 28a).

Furthermore, the District Court found that Renton's ordinance met all four parts of the test in *United States* v. *O'Brien*, 391 U.S. 367, 377 (1968).[22] In particular, Renton's articulated interests in protection of its community through zoning were furthered by its ordinance.

[22] Under this test, a governmental regulation must meet the following criteria to survive a First Amendment challenge: (1) the regulation must be within the constitutional power of the Government; (2) the regulation must further an important or substantial governmental interest; (3) the asserted governmental interest must be unrelated to the suppression of free expression; and (4) the incidental restriction on First Amendment freedoms must be no greater than is essential to the furtherance of the governmental interest.



There was no evidence that the secondary effects of adult land uses in Renton would be different than those in Seattle, Tacoma, or Detroit, and the experience of other cities and towns "must constitute some evidence" for the City Council to consider; the "observed effects in nearby cities provides [*sic*] persuasive circumstantial evidence of the undesirable secondary effects" Renton was attempting to obviate (App. 30a). Renton, according to the District Court, was entitled to experiment in this admittedly delicate and serious area (App. 31a). While some citizens at public meetings predictably expressed concerns that could have formed an impermissible basis for the ordinance, these statements "should not negate the legitimate, predominate concerns of the City Council * * *" (*id.*). Thus, because Renton's "effort to preserve the quality of its urban life * * * is minimally intrusive of a particular category of [the] protected expression" described in *Young* (App. 32a), the District Court granted Renton's motion for summary judgment.

The Ninth Circuit reversed and held Renton's ordinance in violation of the First Amendment (App. 22a). It refused to review the District Court's *O'Brien* rulings under a clearly erroneous test but instead considered them as mixed questions of law and fact, subject to *de novo* review (App. 15a-16a).[23] The Ninth Circuit ruled:

1. Renton improperly relied on the experience of other cities in trying to prove a significant governmental interest to support its enactment. The Court of Appeals distinguished Renton's ordinance from that in *Young* because Detroit's ordinance *dispersed* adult theatres, whereas Renton's *concentrated* them in one area (App. 17a). Furthermore, Renton had to "justify its ordinance in the context of *Renton's* problems—not Seattle's or Detroit's problems" (*id.*; emphasis in original). "Renton

[23] However, the Ninth Circuit recognized that the "clearly erroneous" standard applied to other findings (*id.*).

has not studied the effects of adult theaters and applied any such findings to the particular problems or needs of Renton" (App. 19a). Detroit's studies "are simply not relevant to the concerns of the Renton ordinance * * *" (*id.*).

2. Without disagreeing that 520 acres in all stages of development were outside the areas restricted by the ordinance, the court concluded that this acreage was not "available" in the constitutional sense because "a substantial part" was undeveloped or already occupied by various industrial and commercial concerns (App. 13a).

3. There was "at least an inference that a motivating factor behind the ordinance was the suppression of the content" of speech. The test was not the "predominate" concern of the City Council; where mixed motives are apparent, the test is whether "'a motivating factor in the zoning decision was to restrict'" First Amendment rights.[24]

This Court noted probable jurisdiction.

## SUMMARY OF ARGUMENT

Under both the plurality and concurring opinions in *Young*, Renton's zoning ordinance is valid. In particular, the City has a strong governmental interest in seeking to limit the anticipated secondary adverse effects of adult theatre uses, and its ordinance furthers that interest. As simply a regulation of the *place* where adult theatres may locate, the ordinance is, at most, an incidental restriction upon access to protected expression.

Renton had to rely in part upon the experiences of other cities with the adverse secondary effects of adult theatres, because Renton was acting well before the entry of any such theatres into the City. The Ninth Circuit ruling would prohibit zoning in advance of anticipated adverse effects and would require small cities

[24] App. 20a (quoting *Tovar* v. *Billmeyer*, 721 F.2d 1260, 1266 (9th Cir. 1983) (emphasis deleted), *cert. denied*, 105 S. Ct. 223 (1984)).



and towns needlessly to replicate evidence at considerable expense that had already been established elsewhere. Moreover, Renton relied upon substantial evidence in addition to the experiences of other cities.

Renton's zoning ordinances will have only a minimal impact on First Amendment interests. The land effectively set aside for adult theatres consists of 520 acres, or more than 5% of the entire land area of the City. It is large enough to accommodate over 400 theatres and surrounding parking lots, and consists of land which, as the District Court found, is "in all stages of development from raw land to developed, industrial, warehouses, office, and shopping space that is criss-crossed by freeways, highways, and roads * * *." The Ninth Circuit's conclusion that this land is not constitutionally "available" rests in part on a misreading of the record and in part on the mistaken premise that a city, before zoning, must insure that there be someone immediately available to sell to an adult theatre operator—in effect, a "turnkey" operation. The test of "availability", in the constitutional sense, should be whether the set-aside zone is accessible, and whether prospective theatre operators can build or buy a theatre in the ordinary course of business.

Finally, the Ninth Circuit incorrectly held that the City had failed to prove the absence of an improper motive behind its ordinance. Where, as here, there is a strong and legitimate governmental interest and a minimal impact on First Amendment rights, no inquiry into legislative motive is called for. That is the teaching of both *Young* and *O'Brien*, where this Court refused to undertake the "hazardous" task of determining legislative motive. Moreover, such an inquiry, even if proper, should not be whether any possible illicit motive could have been present but whether there were legitimate motives underlying the legislation. Regardless of the test, the motives behind Renton's ordinance were proper. Virtually every one of them related directly to land uses rather than the content of films. Renton was dealing with such

traditional zoning concerns as a decline in property values and the prevalence of crime. If a city cannot also zone on the basis of the dehumanizing effects of adult land uses on children and the family, property values will be improperly elevated over human ones.

## ARGUMENT

### I. RENTON'S ORDINANCE IS VALID UNDER *YOUNG*.

Cities and towns may regulate the location of adult theatres so long as speech is not substantially inhibited. That was the holding of *Young*, even though a majority of the Court could not agree on a common rationale.

Justice Stevens' plurality opinion recognized at the outset that Detroit's distinction between adult and general fare theatres was content based in the sense that the "adult" classification was expressly predicated on the character of the films exhibited (427 U.S. at 53; *see also id.* at 63). The plurality, joined by Justice Powell, first held that Detroit's zoning ordinances were not void for vagueness (*id.* at 58-61, 73)—a question not in issue here.[25] During the course of its discussion of this issue, however, the Court made two observations that are pertinent here. It said it was not persuaded that the ordinances "will have a significant deterrent effect on the exhibition of films protected by the First Amendment" (*id.* at 60), and there is "a less vital interest in the uninhibited exhibition of material that is on the borderline between pornography and artistic expression than in the free dissemination of ideas of social and political significance * * *" (*id.* at 61). The plurality, again joined by Justice Powell, then held that Detroit's ordinances did not constitute an impermissible prior restraint

[25] The void-for-vagueness argument was based on the grounds that the theatre owner could not determine how much adult entertainment need be shown before the ordinance came into play, and the waiver procedures in the ordinance were not sufficiently specific. Renton's ordinance spells out the requisite "use" necessary to make the restrictions operative, and it has no waiver provisions.



merely because adult theatres were subject to zoning and licensing requirements (*id.* at 62-63, 73). The ordinances placed no limits on the total number of adult theatres that could operate, distributors and exhibitors were not denied access to any market, and the viewing public was able to satisfy its appetite for sexually explicit fare (*id.* at 62-63).

The plurality then turned to the Equal Protection Clause and parted company with Justice Powell. Justice Stevens pointed to numerous instances (including commercial speech) where the content of speech had divided permissible and impermissible conduct, even though government must nevertheless be neutral in its attitude toward the speech itself (*id.* at 66-70). Adult theatres may be regulated because the theatres' location is unaffected by the films' particular message (*id.* at 70). Moreover, even though erotic materials cannot be totally suppressed, society's interest in protecting them "is of a wholly different, and lesser, magnitude" than its interest in protecting political debate (*id*).[26] The state could therefore use "content" as a basis for placing adult theatres in a different classification from general fare theatres (*id.* at 70-71). The ordinances created nothing more than a limitation on the *place* where adult films could be shown, and the limitation was based on the secondary effects of concentration rather than the dissemination of ideas themselves. The effect was not to suppress, or "greatly" restrict access to, lawful speech, and therefore such limitations were constitutional (*id.* at 71-72 & nn. 34-35).

Justice Powell, concurring, reached the same result by a slightly different route. He viewed the case as simply one of innovative land-use regulation, "implicating First

[26] "[F]ew of us would march our sons and daughters off to war to preserve the citizen's right to see 'Specified Sexual Activities' exhibited in the theaters of our choice" (*id.*).

Amendment concerns only incidentally and to a limited extent" (*id.* at 73). The fact that the ordinances created economic loss to the theatres was not important; the theatres were "affected no differently from any other commercial enterprise that suffers economic detriment as a result of land-use regulation" (*id.* at 78). The First Amendment inquiry related to the *effect* of the regulation, and clearly Detroit had imposed no content limitation on the film creators, had not limited their ability to make the films available, and had not restricted "in any significant way" the viewing of those films. The impact of the ordinances was therefore "incidental and minimal" (*id.*).[27] The *number* of adult theatres in Detroit would presumably remain the same, even though some patrons would be inconvenienced.

Under these circumstances, Justice Powell analyzed the ordinances under the four-part *O'Brien* test (*see* n.22, *supra*). There was no question but that the ordinances were within Detroit's power to enact and that the interests furthered were important and substantial,[28] particularly since zoning is perhaps the most essential function performed by local government (*id.* at 80). The third and fourth parts of the test were also met, because Detroit had not embarked on an effort to suppress free expression,[29] nor did it impose more than the minimum encroachment necessary to further its purpose (*id.* at 80-82).

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[27] *See also id.* at 81 n.4: "[A] zoning ordinance that merely specifies where a theatre may locate, and that does not reduce significantly the number or accessibility of theaters presenting particular films, stifles no expression."

[28] "Without stable neighborhoods, both residential and commercial, large sections of a modern city quickly can deteriorate into an urban jungle with tragic consequences to social, environmental, and economic values" (*id.* at 80).

[29] Justice Powell pointed out, for example, that Detroit did not try to close any theatres or restrict their number (*id.* at 82 n.4).



We submit that *Young*'s holding is fully applicable to the facts of the instant case. Renton did not try to close any existing adult theatres or to prevent the entry of such theatres into the city. It did not attempt to restrain the number of theatres that could open or operate. It did not inhibit the creation of adult films or their distribution. It did not regulate in any way the types or numbers of adult films that could be shown. It did not restrict the hours of play or inhibit advertising. It did not distinguish among adult theatres or among adult films. It did not even require a separation among adult uses, nor did it activate special licensing or waiver provisions.

All it did was to provide, in effect, that adult theatres had to be *located* within a certain area. As we show in part III, this area was so commodious and so accessible that any impact on viewing was, at most, "incidental and minimal"; patrons, at most, were "inconvenienced".[30] Far from being "a pretext for suppressing expression",[31] Renton's ordinance was a thoughtful, legitimate response to a real problem, the potential existence of which had been proven many times over in other jurisdictions. Therefore, the ordinance should be sustained under this Court's ruling in *Young*.

## II. RENTON WAS JUSTIFIED IN RELYING ON THE EXPERIENCE OF OTHER CITIES TO ESTABLISH THE ADVERSE SECONDARY EFFECTS OF ADULT THEATRES.

The Ninth Circuit's treatment of Renton's reliance on the experience of other cities was inconsistent and confusing. On the one hand, the court wrote: "[w]e do not say that Renton cannot use the experiences of other cities as part of the relevant record upon which to base its

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[30] *See Young*, 427 U.S. at 78-79 (Powell, J., concurring).

[31] *Id.* at 84.

actions * * *" (App. 19a). On the other hand, the court apparently ruled against Renton in part precisely because of this reliance. It held: "[a]lthough the Renton ordinance *purports* to copy Detroit's and Seattle's, it does not solve the same problem in the same manner" (App. 17a; emphasis in original); Renton must "justify its ordinance in the context of *Renton's* problems—not Seattle's or Detroit's problems" (*id.*; emphasis in original); and "Renton has not studied the effects of adult theaters and applied any such findings to the particular problems or needs of Renton. The studies done by Detroit on the problems of concentrating adult uses are simply not relevant to the concerns of the Renton ordinance—the proximity of adult theaters to certain other uses" (App. 19a).

The Ninth Circuit obviously misunderstood the significance to Renton of the studies on the secondary effects of adult theatres as experienced in other cities. Renton relied on the studies and experiences of other cities not to dictate how Renton should respond to adult theatres in Renton, but rather to establish that adult theatres do indeed have adverse secondary effects—lowered land values, increased crime, and the like.[32]

However, instead of allowing Renton to rely on the studies and experiences of other cities, the Ninth Circuit would require Renton or any other small city to conduct its own study on the effects of adult theatres before en-

[32] In *Young*, it was noted that the location of adult theatres "tends to attract an undesirable quantity and quality of transients, adversely affects property values, causes an increase in crime, especially prostitution, and encourages residents and businesses to move elsewhere" (427 U.S. at 55; plurality opinion). The concentration "causes the area to deteriorate and become a focus of crime * * *" (*id.* at 71 n.34). The influx and concentration of such theatres results in a "cycle of decay" (*id.* at 81 n.4; Powell, J., concurring).

In Seattle, as noted above, the concerns included "the attraction of transients, parking and traffic problems, increased crime, decreasing property values, and interference with parental responsibilities for children." *Northend Cinema*, 595 P.2d at 1155.



acting a zoning ordinance. Such a requirement is patently unreasonable for several reasons. First, Renton passed its ordinance at least nine months before any adult theatre even announced its intention to enter Renton. There were no adult theatres within the City to study. Surely a small city need not wait until an adult theatre has entered and the city has conducted its own study on the theatre's adverse secondary effects before it may take action. Because the adverse secondary effects are magnified and therefore even more pernicious in a small residential community, it is all the more imperative for a city to fulfill its "duty * * * to protect the well-being and tranquility of a community" [33] by taking preventive measures against them.

Second, Renton did not need to prove what had already been proven elsewhere. A small city need not hire the same experts who testified in other cases to repeat their testimony on the results of their research. This would be a wasteful and expensive duplication of time and effort—to no purpose. Moreover, the costs would undoubtedly be prohibitively high for many small city or town budgets.

Furthermore, the Ninth Circuit failed to note that the Detroit ordinance approved in *Young* was itself based in part upon the experiences of other cities. The evidence introduced before the Detroit City Council "consisted of reports and affidavits from sociologists and urban planning experts, as well as some laymen, on the cycle of decay *that had been started in areas of other cities*, and *that could be expected in Detroit*, from the influx and

[33] *Kovacs* v. *Cooper*, 336 U.S. 77, 83 (1949) (footnote omitted). *See also Breard* v. *Alexandria*, 341 U.S. 622, 640 (1951); *Rast* v. *Van Deman & Lewis Co.*, 240 U.S. 342, 357 (1916) ("It is the duty and function of the legislature to discern and correct evils, and by evils we do not mean some definite injury but obstacles to a greater public welfare").

concentration of such establishments." 427 U.S. at 81 n.4 (Powell, J., concurring) (emphasis added).[34]

Before enacting its ordinance, Renton took more than adequate steps to assure itself that adult theatres do have adverse secondary effects and that the particular cities on which Renton was relying had experienced those effects. Renton officials reviewed the *Young* and *Northend Cinema* decisions, which set forth the results of the studies on the effects of adult theatres (JA 167, 267-268).[35] They also studied a "summary of findings and conclusions of the City of Seattle relative to the adoption of their zoning ordinance * * *" (JA 170). Renton's officials considered a report from the Municipal Research and Service Association of Washington Cities which reviewed adult theatre cases (JA 168). The Renton City Council received comments from its own land use planning professionals relating the experiences of other cities, as well as a "comprehensive report from the [Renton] City Attorney's office relating to the proper scope of land use regulations and experience from other cities" (JA 27).

After reviewing all of the above material, Renton had more than enough information to conclude that adult

[34] Experts in *Young* recited their experiences in many different cities and towns in Michigan (Appendix in *Young* at 18-19), New York City (*id.* at 30, 35), and cities in countries as far away as Sweden, Denmark, West Germany, France, Britain and Italy (*id.* at 32).

[35] The Ninth Circuit correctly noted that *Young* focused on the effects of concentration of adult theatres (App. 19a). But this Court would not have emphasized the need to experiment (427 U.S. at 71; plurality opinion), or approved both the concentration and dispersal methods of treating the problems (*id.* at 62, 71), if only the secondary adverse effects of clustering justified zoning. Moreover, Renton did not rely solely on *Young*. For example, the study conducted in Seattle, which was discussed in *Northend Cinema*, analyzed land uses around adult theatres, some of which were located in downtown areas and others of which were scattered in residential areas. *Northend Cinema*, 585 P.2d at 1155.



theatres do cause adverse secondary effects. But Renton's officials went even further and held public meetings and listened to its own citizens express their concerns over the adverse secondary effects of adult theatres. Whether these citizens were using their own common sense or basing their fears upon what they had been told about other cities is irrelevant. A city council is entitled to respond to such rational concerns. Renton also heard from citizens of other cities as to what had, indeed, happened elsewhere. It is not important that those from other jurisdictions were not experts, or that they did not cite specific surveys, studies, or statistics in regard to what they had perceived. One does not have to be an expert to observe and relate the obvious.[36]

If the Ninth Circuit meant that Renton failed to prove with sufficient particularity what had occurred elsewhere, it was simply wrong. The results of the City Council's inquiry were not conflicting or ambiguous. There was evidence creating a legitimate concern that the entry of even one adult theatre into Renton's small central business district would have numerous and serious deleterious effects. Property values in the area surrounding that theatre would decrease. Nearby businesses that were not themselves engaged in adult uses would suffer financial harm. The incidence of crimes such as prostitution and assault would rise in the immediate vicinity of the thea-

[36] In an analogous situation, the Court has pointed out that "a robust common sense" can substitute for hard evidence:

> The sum of experience, including that of the past two decades, affords an ample basis for legislatures to conclude that a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality, can be debased and distorted by crass commercial exploitation of sex. Nothing in the Constitution prohibits a State from reaching such a conclusion and acting on it legislatively simply because there is no conclusive evidence or empirical data. [*Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49, 63 (1973).]

tre. Many people would be reluctant to use parks and churches located nearby. Families with young school children who walked through the adult use area would find it more difficult to instill those moral and ethical values that form the backbone of solid family relationships.[37] Furthermore, the City Council's conclusions have been fully supported by literature of a more scientific nature.[38]

The Ninth Circuit's requirement that a city create its own record of local degradation before taking action drains the vitality from the important municipal interests recognized in *Young*.[39] The very purpose of city

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[37] This Court's decisions have established that "the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural." *Moore* v. *City of East Cleveland*, 431 U.S. 494, 503-504 (1977) (footnote omitted).

[38] *E.g.*, Report from Carl I. Delau, Captain, to John Kukula, Deputy Inspector, Cleveland, Ohio Police Department, *Smut Shop Outlets: Contribution of These Outlets to the Increased Crime Rate in the Census Tract Areas of the Smut Shops* (August 24, 1977); Department of City Planning, City of Los Angeles, *Study of the Effects of the Concentration of Adult Entertainment Establishments in the City of Los Angeles* (City Plan Case No. 26,475, June 1977); Marcus, *Zoning Obscenity: Or, the Moral Politics of Porn*, 27 Buffalo L. Rev. 1, 9 & nn.43-44 (1977); Department of Metropolitan Development, Division of Planning, Indianapolis, Indiana, *Adult Entertainment Businesses in Indianapolis: An Analysis* (Feb. 1984); MacKinnon, *Pornography, Civil Rights and Speech*, 20 Harv. C.R.-C.L. L. Rev. 1, 41 (1985); Planning Department, City of Phoenix, *Adult Business Study* (May 25, 1979). *See also* Appendix in *Young* at 5-6, 19-20, 24-25, 30-32.

Among the secondary effects of adult entertainment businesses found in these studies and surveys were increases in crime, especially prostitution and other sex crimes, and negative economic impact on both residential and commercial property.

[39] This requirement was rejected by the District Court below (App. 30a), has been properly rejected by other courts, and, we submit, should also be rejected here. For example, the Seventh Circuit has held:

> A legislative body is entitled to rely on the experience and findings of other legislative bodies as a basis for action. There is no reason to believe that the effect of congregated adult uses in Peoria is likely to be different than the effect of such congregations in Detroit. [*Genusa* v. *City of Peoria*, 619 F.2d 1203, 1211 (7th Cir. 1980).]



planning, and zoning in particular, is to anticipate, to foresee, and, by planning ahead in an even-handed way, to further important, legitimate city interests[40] and to obviate adverse secondary effects. Although there was no way that Renton could pinpoint exactly what harm would result from the entry of an adult theatre into Renton—whether, for example, an adult theatre would cause an adjoining grocery store to lose 3% or 25% of its business, whether a *particular* child would be corrupted by this environment, or how often certain crimes would occur—Renton's conclusion that there would be adverse secondary effects was soundly based on the experience of other cities.[41]

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The California state courts also disagree with the approach taken by the Ninth Circuit. In one case, for example, a court wrote that "this thesis would deny to lawmakers in one locale the benefit of the wisdom and experience of lawmakers in another community, no matter how similar the circumstances; it would, as it were, require the reinvention of the wheel countless times over when mere access to common knowledge would render the considerable effort involved unnecessary." *County of Sacramento* v. *Superior Court*, 137 Cal. App. 3d 448, 455, 187 Cal. Rptr. 154, 158 (1982). *Accord: City of Vallejo* v. *Adult Books*, 167 Cal. App. 3d 1169, 213 Cal. Rptr. 143, 149 (1985); *Strand Property Corp.* v. *Municipal Court*, 148 Cal. App. 3d 882, 887, 200 Cal. Rptr. 47, 49 (1983).

[40] *Memphis* v. *Greene*, 451 U.S. 100, 187 (1981); *Moore* v. *City of East Cleveland*, 431 U.S. at 503-504; *Village of Belle Terre* v. *Boraas*, 416 U.S. 1, 9 (1974).

[41] Moreover, were a city to await the entry and deleterious effects of adult theatres, it would run the risk encountered by other cities of being accused of drawing its zoning lines with the intent of closing down a particular theatre (or theatres) already operating within its borders. *See, e.g.*, cases cited in the Jurisdictional Statement at 11-12 & n.24.

For Renton to have assumed that it would *not* experience what had already occurred in other cities would have been the height of irresponsibility. This was not, after all, an isolated city or a city with characteristics wholly dissimilar from those of its neighbors. It was, as Playtime's president noted, on the "South End" of Seattle and near other communities in Washington where Playtime's own adult theatres had already operated. The evidence before the City Council was devoid of any indication that the effect of an adult theatre would be any different in Renton than in Seattle or elsewhere.

In holding that Renton did not justify its ordinance in the context of Renton's concerns (App. 19a), the Ninth Circuit apparently overlooked the foundation of Renton's ordinance. In determining the best method for Renton to deal with the effects of adult theatres, Renton relied upon the advice of its Policy Development Director, who had years of land use planning experience.[42] As demonstrated by his testimony,[43] he and his staff were fully familiar with every aspect of the city's plats, zones and uses. Furthermore, Renton heard from its citizens at public meetings, including the head of the Renton Chamber of Commerce and the Superintendent of Schools. There was really nothing more for Renton's officials to learn about the City as a basis for its zoning ordinance.

The Ninth Circuit failed to accord Renton "a reasonable opportunity to experiment" in dealing with the adverse effects of adult theatres as required by *Young*.[44] This Court there specifically held that it was for local authorities and not the Court to select a zoning scheme. In so doing, the Court stated that "we have no doubt that the municipality may control the location of theaters as well as the location of other commercial establishments,

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[42] JA 25, 56, 75, 103-106, 174, 213.

[43] JA 25-30, 53-91, 100-211, 248-280.

[44] *Young*, 427 U.S. at 71 (plurality opinion).



*either by confining them to certain specified commercial zones or by requiring that they be dispersed throughout the city.* * * * It is not our function to appraise the wisdom of its [the Detroit City Council's] decision to require adult theaters to be separated rather than concentrated in the same areas."[45] Thus, the fact that Renton's ordinance uses the set-aside approach[46] rather than dispersal does not make *Young*'s holdings any less applicable in this case.

Like many other small cities, Renton could not afford extensive on-site sociological surveys of the probable impact of adult theatres. Instead, it drew upon the wealth of experience that has emerged from other cities across America and enacted an ordinance to protect and preserve its residential and commercial areas from deleterious effects of adult theatres. Renton's ordinance furthers these "important and substantial" interests specifically recognized in *Young* and should be upheld.

## III. RENTON'S ORDINANCE LEAVES SO MUCH ACCESSIBLE LAND AVAILABLE FOR ADULT USES THAT FIRST AMENDMENT RIGHTS ARE RESTRICTED ONLY INCIDENTALLY.

In *Young*, this Court upheld the Detroit adult land use zoning ordinances without subjecting them to any requirement that the land left available for adult uses be of any minimum size or contain any particular types of existing uses. The Court focused on the city's justification for regulating adult uses rather than on the economic desirability to the operators of the available areas. The most that can be drawn from the plurality's opinion with re-

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[45] *Id.* at 62, 71; emphasis added.

[46] Renton chose to place its adult theatres in one section of the City, but away from homes, schools, etc., much like Boston and certain other cities have done. American Society of Planning Officials, Planning Advisory Report No. 327, *Regulating Sex Businesses* 7-8 (May 1977); Marcus, *supra* n.38, at 3; F. Strom, *Zoning Control of Sex Businesses* 62-64, 103-126 (1977).

spect to the "availability" of land is that an ordinance might be struck down if the area off limits to adult theatres was so nearly total that "the ordinance had the effect of suppressing, or greatly restricting access to, lawful speech" (427 U.S. at 71 n.35). The plurality ruled that the District Court's findings conclusively established that this was not the case in *Young* (*id.*).

A comparison of the District Court findings and underlying evidence in *Young* with the findings and evidence in this case demonstrates that Renton has afforded adult movie operators more than ample opportunity for expression. In *Young*, the Court relied on the following District Court finding in determining that the ordinance did not suppress speech:

> The Ordinances do not affect the operation of existing establishments but only the location of new ones. There are myriad locations in the City of Detroit which must be over 1,000 feet from existing regulated establishments. This burden on First Amendment rights is slight. [427 U.S. at 71 n.35, quoting 373 F. Supp. at 370.]

The express findings of the trial court in the instant case were substantially identical.[47]

Even if one were to look beyond the findings here to the underlying evidence, it is clear that Renton's geographic limitation in no way "suppresses" speech or "greatly restricts" access to it. Renton's original ordinance effectively set aside approximately 400 acres where adult theatres could locate, and this was expanded to 520 acres when certain mistakes were corrected and the restriction in relation to schools was reduced from one mile to 1000 feet (JA 213). This zone therefore accounted for more than 5% of the entire land area of Renton (as compared with Seattle's set-aside zone of less than 1% of its acre-

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[47] *E.g.*, App. 27a-28a.



age[48]). The set-aside area is large enough to accommodate well over 400 theatres and surrounding parking lots.[49] Its acreage is larger than one-fourth of the entire area of Renton occupied by single-family residences and exceeds the amount of land in the City used for either multi-family residences, commercial uses, or parks and recreation (JA 26). Witnesses for both Renton and Playtime testified that part of the 520 acres is simply unoccupied land, undeveloped or in the process of being developed.[50] Some of the land is already developed and in use—there is an "industrial or light manufacturing area and, then, there was another area that we went by that was developed with retail businesses".[51] Playtime's own witness conceded, by way of example, that if the Shakey's Pizza and the Burger King located "at the edge of a shopping center" could be acquired "and a 400-seat theatre could be put in there, I would think that would be a viable location for, you know, an adult theatre" (JA 240-241). He also admitted that some properties in the area were for sale.[52] The District Court found that the zone available to adult theatres was comprised of land "in all stages of development from raw land to developed, industrial, warehouse, office, and shopping space that is criss-crossed by freeways, highways, and roads * * *" (App. 28a).

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[48] JA 30.

[49] Playtime's own attorney assumed that an adult theatre seating 400 persons would require 6000 sq. feet of space (JA 145-147, 149). Renton's Policy Development Director testified that such a building would need 40,000 additional sq. feet for parking, plus or minus 10% for error, or a maximum total of 52,000 sq. feet for the entire theatre area (JA 145-149). A 520-acre area would encompass 22,651,200 sq. feet, or some 435 theatre areas.

[50] JA 85, 213, 219, 221-222, 240, 262.

[51] JA 240; *see also* JA 213, 223-224, 240-241, 262.

[52] JA 219, 221-222.

Nevertheless, the Ninth Circuit concluded that these 520 acres were "unavailable" for adult theatres. Of course, its most fundamental error lay in failing to rely on the District Court's express findings to the contrary, which are not clearly erroneous. But even viewing the record *de novo*, it is not easy to divine why the Ninth Circuit thought the set-aside zone was "unavailable" and suppressed speech (App. 13a-14a). The court's sole basis for such a conclusion must have been that part of the zone was unoccupied and that part was already occupied and in use. As to certain of the existing uses, the court simply misread the record.[53] Even apart from its factual errors, the Ninth Circuit's thesis is exceedingly curious.

First, it is uncontroverted that, while part of the zone may be occupied, an area large enough to contain numerous theatres is not. Second, the type of area to which Playtime seeks to gain access—the downtown business district—is by definition an area that is densely developed. If the present occupation of land is the measure of "availability," then downtown Renton is certainly less "available" than the area now open to adult uses.

Third, the Ninth Circuit's approach gives the adult theatre owner a preferred position above every other po-

[53] The court cited such properties as the Longacres Racetrack and a sewage plant as being within the set-aside zone, when in fact the racetrack and the plant are clearly outside the zone (*see* maps at App. 140a-142a). The confusion can only be accounted for by the fact that the court relied on a map, and accompanying testimony, submitted at the early TRO hearing prior to the time that the permissible distance from schools was reduced from one mile to 1,000 feet (*see* JA 25-31, incl. map; JA 66-67, 217-228, 272, 276-277). The map also contained a number of errors because it had to be prepared within a few hours' time (JA 164-165, 263-265, 272, 273-274, 276-279). The TRO testimony, prior to correction, estimated the size of the set-aside area to be approximately 400 acres, with about half of it unoccupied (JA 30, 57, 126, 199), and many of the "uses" included by the Ninth Circuit fell outside the zone (*compare* map at JA 31 *with* map at JA 215). With the errors corrected and the amended ordinance taken into consideration, the set-aside area became substantially different (and larger) (JA 215).



tential purchaser of property. He does not have to compete in the marketplace for land like everyone else, including drug stores, hair salons and theatre owners showing regular fare. Even the business offices of the press, also protected by the First Amendment, enjoy no such privilege.[54] Under the Ninth Circuit's thesis, a city must insure the existence of a "turnkey" location for the adult theatre operator; property must stand ready to be sold to such an operator from a willing seller. But the fact that some present owners express no immediate desire to sell cannot reasonably be deemed a disqualifying factor. It is a fact of commercial life faced by all potential purchasers regardless of the nature of the applicable zoning restrictions.[55] Moreover, the fact that land is currently occupied does not mean that it could not be had at a price determined by the market. Owners constantly change their minds, either voluntarily or through the vicissitudes of business life. There was certainly no indication in *Young* that space would be immediately available in the areas to which the adult theatres would be forced to move, and there should be no such requirement here.[56] Finally,

[54] Churches, too, must obey zoning laws in the free exercise of their religions and must buy property under the ordinary rules of supply and demand. *See American Communications Ass'n* v. *Douds*, 339 U.S. 382, 397-398 (1950); *Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc.* v. *City of Lakewood*, 699 F.2d 303, 307-309 (6th Cir.), *cert. denied*, 104 S. Ct. 72 (1983).

[55] Playtime's real estate witness could not testify that all property owners within the set-aside zone would not sell. Some owners told him they would sell, some said they did not think the property was "suitable" for this use, and he could not reach others (JA 218-224). And even some 22 acres owned by the City is not wholly immune from sale to third parties. Minutes, Renton City Council, Sept. 24, 1984, at 1.

[56] Given the accessibility of the available zone, the protest that box office revenues may be lower there than elsewhere is unavailing. In addition to the fact that there is no record proof of this premise, there is no basis in the Constitution or in this Court's decisions for the thesis that a city is required to permit adult uses at the

the fact that others have already built or bought in the zone demonstrates that it is a frequented, accessible, and economically viable area. This is especially the case where, as here, the existing uses include "a fully-developed shopping center" (App. 14a).[57]

In sum, the fact that part of the set-aside zone is presently occupied does not make that part, much less the zone as a whole, "unavailable." Renton submits that a set-aside zone should be deemed "available" when it is accessible—both in terms of distance from populated areas of the city and in terms of internal streets and highways—and when prospective theatre operators can build or buy a theatre there at such time as property becomes available in the ordinary course of business.

The Renton set-aside zone easily meets this test. It is within 15 to 20 minutes from any point in Renton, the entire city being only 15.3 square miles in size. The record shows that patrons will drive such distances to view adult movies. For example, one of Playtime's most profitable theatres is located in Point Roberts, Washington, a town of only 250 people. That theatre draws 1500 patrons a week from Canada — principally from Vancouver, British Columbia, which is from 20 to 40 minutes away (JA 244, 375-376, 377-378). Playtime's own president conceded that Renton is an "area that you can

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location or locations that an adult movie operator deems economically optimal, regardless of the adverse secondary effects. "The inquiry for First Amendment purposes is not concerned with economic impact * * *." *Young*, 427 U.S. at 78 (Powell, J., concurring).

[57] An industrial park within the zone (App. 13a) also is available for adult movie uses. Unrebutted testimony indicated that adult theatres would be an allowable use in areas designated "industrial park" (JA 88). In fact, Renton's Policy Development Director noted that it might be very appropriate for adult theatres to locate in these areas; "[i]f it's on a major arterial in an industrial area, it would provide an excellent opportunity for shared use of parking, different traffic pattern usages, which would make better use of the property" (JA 176).



draw everything into" (JA 392). As far as residents of adjoining suburbs and Seattle are concerned, Renton's set-aside zone is *more* accessible than Playtime's downtown location, due to the proximity of freeways.

The zone is accessible, and it has adequate parking facilities. Descriptions of access show that the zone is bounded and criss-crossed by highways, streets and roads from two to four lanes wide.[58] Moreover, there are plans for further street improvements, and contracts have already been let to widen some lanes.[59] Traffic problems were discussed many times with the City Council (JA 265), and the City's Policy Development Director testified that the zone was at least equal to or better than the downtown area, particularly since downtown, where Playtime's theatres are located, is congested.[60]

Adoption of the Ninth Circuit's "availability" theory, which permits a court to disregard a large and accessible set-aside zone, would make it impossible for many small residential cities like Renton to implement effective adult use zoning. The secondary effects of adult theatres are likely to be greater in a small suburb than a large city, due to the theatres' inevitable relative proximity to residential areas. At the same time, however, a small municipality tends to have less land "available" for adult uses and thus would be forced to open up areas where the secondary effects of adult uses will be especially great. In this way, the Ninth Circuit approach affords a small city like Renton lesser means to protect itself against secondary adverse effects than a city like Detroit, which has more space and larger areas containing compatible land uses. By any realistic standard, Renton's set-aside zone is available for adult uses and is fully adequate to

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[58] JA 82, 89-90, 91, 213-214, 242, 257-259.

[59] JA 87, 89-91, 213-214, 257-258.

[60] JA 259-260, 261, 265-266.

permit theatre owners to present, and any interested patrons to see and hear, adult movie fare.[61]

## IV. RENTON'S OTHERWISE VALID ORDINANCE SHOULD NOT BE STRUCK DOWN BASED ON AN INFERENCE AS TO THE SUBJECTIVE MOTIVATIONS OF COUNCIL MEMBERS.

Having concluded that Renton could not justify its ordinance by its concern about the secondary effects of adult theatres, the Ninth Circuit went on to hold that the City had also failed to prove the absence of an improper motive. According to the Court of Appeals, Renton was required to prove that its motives were entirely benign—*i.e.*, that distaste for the content of adult films played no role whatever in the passage of the zoning ordinance. The court purported to derive this standard from *O'Brien*'s requirement that a law be based on a state interest "unrelated to the suppression of free speech" (App. 19a). Because it discerned an inference of "mixed motives" here (App. 20a), the court struck down the ordinance. This approach was incorrect for several reasons.

### 1. Neither *O'Brien* nor *Young* contemplates an inquiry into legislative motive.

The decision in *O'Brien* makes clear that, once a substantial state interest has been identified, and the limitations on First Amendment rights are determined to be "incidental",[62] courts may not go beyond that determination in a search for some other, perhaps improper, motivation. The Court could hardly have made the point more clearly. It reviewed in some detail the proffered governmental interest in preserving the integrity of the Selective Service System, and thus individual draft cards. Having concluded that the interest was a legitimate one, and one that the particular regulation was well suited to serve, the Court then held that it was sufficient to justify the modest imposition on speech that resulted. The Court did *not* go further and speculate about what other purposes—legitimate and illegitimate—might also be served by the law. It was the presence of legitimate interests, not the absence of illegimate ones, that was central to the Court's reasoning in *O'Brien*.[63]

To make matters even clearer, the Court in *O'Brien* then expressly refused to undertake the exact inquiry that the Ninth Circuit found to be necessary here. Faced with respectable evidence that some members of Congress may have viewed the legislation as an effective means of limiting criticism of the Vietnam war, the Court refused

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[61] This case is thus at the furthest extreme from *Schad* v. *Borough of Mount Ephraim*, 452 U.S. 61 (1981), where nude dancing was entirely prohibited.

[62] 391 U.S. at 377. As Justice Harlan pointed out in his concurring opinion, O'Brien "manifestly could have conveyed his message in many ways other than by burning his draft card" (*id.* at 389).

We have shown in parts I-III that any restraint on Playtime and its customers is entirely incidental. The greatest harm Playtime can assert is that it cannot locate in the heart of Renton's very small downtown business district and must instead locate in an area that can accommodate over 400 theatres, which is within 15-20 minutes by car from any point in Renton. On the other hand, by zoning to prevent the deleterious secondary effects of adult theatres, Renton was engaging in what Justice Powell has called perhaps the most essential function performed by local government (*Young*, 427 U.S. at 80; concurring opinion). Its interest in preventing the "cycle of decay" that had become evident in *Young* five years before Renton acted and had been increasingly duplicated since then was substantial and compelling. *See O'Brien*, 391 U.S. at 376-377.

[63] *Cf.* Emerson, *First Amendment Doctrine and the Burger Court*, 68 Calif. L. Rev. 422, 472 n.16 (1980) (whether free expression has been abridged is the basic issue).

*See* an analogous discussion in *United States* v. *Albertini*, 53 U.S.L.W. 4844, 4848 (U.S. June 24, 1985) (the *effect* of a time, place and manner restriction is controlling, and the fact that some imaginable alternative might be less burdensome on speech does not invalidate the restriction).

to give any weight to this possibility. Noting that "[i]nquiries into congressional motives or purposes are a hazardous matter," the Court declined to set aside a statute "which Congress had the undoubted power to enact and which could be reenacted in its exact form if the same or another legislator made a 'wiser' speech about it" (391 U.S. at 383, 384).

This same approach was followed in *Young*. In that case, the plurality began by asking whether there were legitimate governmental interests that could justify limited regulation of the location of adult theatres (427 U.S. at 62-70). Having determined that there were, and that First Amendment rights were minimally implicated, the plurality then simply looked at the Detroit ordinances themselves to ensure that their actual terms corresponded with the justifications put forward by the city (*id.* at 71-73). At no time did the plurality attempt to identify possible ancillary purposes on the part of City Council members.[64]

As the Court noted in *O'Brien*, courts do look at intent when they are *interpreting* legislation, "because the benefit to sound decision-making in this circumstance is thought sufficient to risk the possibility of misreading" the legislative purpose (391 U.S. at 383-384). But in so doing, they are looking only at the meaning of statutory language and what the legislators said about it on the record. An inquiry into legislative *motives*, undertaken for the purpose of testing the validity of a statute, is "an entirely different matter" (*id.* at 384).

A serious effort to establish the "real" reasons why a law was passed would require a court to reconstruct the complex political dynamic that is at work in any leg-

[64] This was despite the fact that the adult theatre owners in that case had argued that the Court need not accept assertions of legislative purposes at face value and that the mere recitation of a benign purpose was not an automatic shield against inquiries into actual purposes underlying the statutory scheme. Brief of Respondents American Mini Theatres, Inc. and Pussy Cat Theatres of Michigan, Inc., No. 75-312, at 36-37.



islative body. Such an inquiry would be hampered by the fact that various legislators may support a law for their own idiosyncratic reasons. Indeed, many of them may have mixed motives themselves. Moreover, much of the relevant information simply will not be available to a court as it passes on a statute months, or years, after its enactment. In sum, it is a rare circumstance in which a court can say anything with much confidence about the subjective motives of an entire legislature.

**2. Even if motive is a proper subject for inquiry, the Ninth Circuit used an overly restrictive test.**

Even if the Ninth Circuit was correct in its view that it could look into legislative motive in this case, it incorrectly held that the mere inference of an improper motive required that the ordinance be struck down. The proper test empowers a court simply to determine that a legitimate motive in fact was present, not to disregard proper motives on the basis of a possibly improper one.

The general practice of this Court, in those cases where motive has become the subject of inquiry, has been to place the emphasis on the existence of a legitimate motive, not the possibility of a mischievous one.[65] Thus, the

[65] This Court has pointed out that "inquiry into legislative motive is often an unsatisfactory venture" and has declined to engage in such a venture even when the legislative motive was suspect. *E.g., Pacific Gas & Elec. Co.* v. *State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 216 (1983) (plurality opinion); *Palmer* v. *Thompson*, 403 U.S. 217, 224 (1971).

The Court *has* authorized invalidation of a statute based on a finding that impermissible *racial* motives entered into the legislative process. *Compare Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 267-270 (1977), *with Hunter* v. *Underwood*, 105 S. Ct. 1916 (1985). This special rule reflects the felt need to eliminate all forms of race-based legal distinctions. *See Village of Arlington Heights*, 429 U.S. at 265 ("racial discrimination is not just another competing consideration"). Since virtually any domestic legislation may have some unforeseen disparate *impact* on various racial groups, there is no objective way of determining which laws are infected by racial prejudice. Instead, it becomes necessary to look at legislative intent

Court has refused to invalidate otherwise valid governmental action so long as it was motivated at least in part by a purpose within the legitimate powers of the acting body, even where some improper motive also played a role.[66] Put differently, at most a court may demand that the proffered state interests have been *among* the purposes actually in the minds of legislators—*i.e.*, that it not be a total fabrication.

The Ninth Circuit came at the intent issue from the other end. By requiring that there be no element of illegitimate motive whatever in the legislative process, the Court of Appeals has set at risk any legislation passed under circumstances where improper motive played even a minor role, regardless of how important the other legitimate state goals may be. In practice, this test may prove an almost impossible hurdle in cases involving matters of controversy, where accusations about wrongful motives are easy to come by and hard to disprove. That problem is, in fact, well illustrated by the result in this case, where an unsupported "inference" of bad motive has so far prevented the City of Renton from pursuing legitimate goals through the means explicitly authorized by this Court in *Young*.

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as the only available means of differentiating among facially neutral laws and determining which should be invalidated because they reflect continued efforts to suppress racial minorities. *But see Mt. Healthy City Board of Education* v. *Doyle*, 429 U.S. 274, 285-287 (1977).

[66] *See, e.g., Michael M.* v. *Superior Court*, 450 U.S. 464, 470 (1981) ("We are satisfied * * * that the [asserted state interest] * * * is at least one of the 'purposes' of the statute * * *"); *McGinnis* v. *Royster*, 410 U.S. 263, 276 (1973) ("So long as the state purpose upholding a statutory class is legitimate and nonillusory, its lack of primacy is not disqualifying"). *See also Euclid* v. *Ambler Realty Co.*, 272 U.S. 365, 388 (1926) ("If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control").

Motivational analysis might be appropriate where the proffered justification for the challenged regulation is obviously a sham, but such is clearly not the case here.



**3. Even if intent is a proper inquiry, there is no basis for a determination that Renton's City Council was improperly motivated.**

Even if the Ninth Circuit was correct in looking at the purity of the City Council's motives in this case, there was no basis in the record for its "inference" that there were improper motives. On the contrary, the statements and circumstances that accompanied the enactment of this ordinance make it clear that Renton was engaged in a good-faith effort to apply the teaching of *Young* in its own context. While the Ninth Circuit's failure to elaborate on what it meant by "an inference" of improper motive complicates the analysis, it is clear that Renton's City Council was not unduly influenced by impermissible purposes.

First, if the Ninth Circuit found an inference of improper motive in the comments of some citizens at public meetings, the District Court was correct in dismissing these as a reason for invalidating the ordinance that ultimately evolved. The District Court noted that the City Council heard statements from citizens who "[p]redictably * * * expressed concerns reflecting their values which might be impermissible bases for justification of restrictions affecting first amendment interests" (App. 31a). Inclusion of these comments, according to the trial court, "should not negate the legitimate, predominate concerns of the City Council nor lessen the value of the circumstantial evidence of adult land uses' effects in nearby cities" (*id.*). Thus, in ruling that the inclusion of citizen concerns was "not a material consideration" (App. 32a), the District Court implicitly held that Renton successfully rebutted Playtime's allegation of improper motive.

Moreover, the motives of some citizens should not automatically be imputed to the City Council. *Village of*

*Arlington Heights*, 429 U.S. at 267-270.[67] City councils should not be held responsible for the fact that some citizens do not like adult films. The effect of the Ninth Circuit's ruling on city governments would be that hearings preceding the adoption of zoning ordinances would have to be canceled or closed to the public, or speakers would have to be approved and pre-censored. None of these steps is practical, and they may even be unconstitutional in denying citizens their own First Amendment rights to speak. *See City of Madison Joint School District* v. *Wisconsin Employment Relations Comm'n*, 429 U.S. 167, 174-176 (1976). Most jurisdictions (including the State of Washington) require by law that such proceedings be open to the public, precisely so that citizens can express a wide variety of views on the subjects under consideration. The Ninth Circuit approach would constitute an invitation to adult theatre owners such as Playtime to induce citizens to appear at hearings and express impermissible views in order to invalidate any subsequently-enacted ordinance, no matter how well intended by the legislature.

If, on the other hand, the Ninth Circuit's "inference" derives from the findings of the City Council itself, the court, we submit, simply misread them. First, the findings that grew out of the March 5, 1981, public hearing (App. 81a-85a) specifically recognized the legitimacy of the First Amendment rights being asserted in this case: the City would prevent the harmful secondary effects of

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[67] The record in *Young* showed that a number of Detroit citizens complained about pornographic content. For example, one resident whose letter was introduced into evidence complained to the Mayor, "They have pornography available in their back room, and it is disgusting * * *" (Appendix in *Young* at 26), and an attorney for the city conceded: "The concern of the neighborhood over the showing of this kind of movie has been evidenced time and again by picketing, by calls and letters to our office, to the Mayor, to the Common Council and so on" (*id.* at 48). Yet the Court declined to address the issue of legislative intent.



adult theatres in the central business district and surrounding neighborhoods "while providing to those who desire to patronize adult entertainment land uses such an opportunity in areas within the City which are appropriate for location of adult entertainment uses" (Finding 17). The findings also set forth the reason for zoning in advance of the entry of adult uses (Finding 5), and recited the "blighting" and "skid row effect" that had already made themselves evident in other cities (Finding 14). In this latter respect, it was noted that the impact in Renton would be "significantly larger" than in other cities because of Renton's smaller size (*id.*).[68]

Second, *every one* of the 20[69] findings related to the secondary effects of adult theatres and to the relationship between an adult theatre's location and the magnitude of those secondary effects.[70] None of them referred to the content of the films themselves except by the use of the word "adult" in describing the theatres—a reference approved in *Young*. These findings reflect the City Council's adequate factual basis for its conclusion that its ordinance would minimize the inevitable secondary effects of adult theatres.[71]

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[68] Renton's population, for example, is only 7% of Seattle's (JA 30).

[69] Findings 18, 19 and 20 were misnumbered "19", "20" and "21." Numbers 19, 20 and 21 will be treated here as 18, 19 and 20.

[70] All 20 of them referred to the "land uses" to which the theatres would be put, and seven of them referred to their "close proximity" (Findings 3, 4, 8, 9, 11, 13, 19).

[71] *Cf. Moore* v. *City of East Cleveland*, 431 U.S. at 500 (challenged ordinance had only "a tenuous relation to alleviation of the conditions" sought to be relieved); *Linmark Assocs., Inc.* v. *Township of Willingboro*, 431 U.S. 85, 95-96 (1977) (ordinance banning "For Sale" signs on lawns not necessary to maintain integrated community).

Third, each of the concerns expressed in these findings was approved in *Young* and/or *Northend Cinema*. These were concerns over (a) whether people would frequent residences, churches, parks, public facilities and schools located in the immediate vicinity of adult theatre uses;[72] (b) whether both residential and commercial values would be adversely affected by these uses;[73] (c) whether there would be an increase in crime, including sexual offenses and assault;[74] (d) whether retail trade, and consequently tax revenues, would be reduced;[75] and (e) whether there would be an adverse impact upon children, and upon the ability of parents and schools to teach family values if these children constantly passed adult theatres on their way to or from schools or commercial areas.[76] Moreover, the City Council found no evidence that these adult land uses would improve the community's commercial viability.[77]

Six additional findings (App. 85a-86a) grew out of the February 25, 1982, public hearing, which was held *after* the original Ordinance 3526 was enacted but *before* the amending Ordinance 3629 was adopted on May 3, 1982 (App. 81a). The amending ordinance *broadened* Playtime's rights—it reduced, for example, the proscribed area around schools from one mile to 1000 feet and effectively added approximately 120 acres to the set-aside zone. It would be difficult to read into such findings an intent to restrict or suppress speech when they supported an amendment accomplishing exactly the opposite result.

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[72] Findings 1, 3, 4, 11, 13, 16, 18.

[73] Findings 4, 5, 11, 13, 14, 17, 18, 20.

[74] Finding 12.

[75] Finding 13.

[76] Findings 2, 6-9, 19.

[77] Finding 15.



Three of these six findings again emphasized the negative secondary effects caused by the location of adult theatres near other incompatible uses.[78] Four spelled out in more detail the adverse influence upon children and the family already cited in the previous findings—the influence of pornography external to the home, the loss of sensitivity to the adverse affect of pornography upon children and established family relations and the concept of non-aggressive consensual sexual relations, the disruption caused to youth programs, and the like.[79] The final two findings cited once again the decline in property values and the blight that could be anticipated,[80] and noted the very practical problem caused by citizens outside of Renton viewing film fare "away from areas in which they are known and recognized."[81]

Preventing children's exposure to the decay surrounding adult theatres is surely a legitimate and substantial governmental interest.[82] As this Court has said as to zoning in another context: "It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people." *Village of Belle Terre*, 416 U.S. at 9.[83]

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[78] Findings 2, 5, 6.

[79] Findings 1, 2, 5, 6.

[80] Finding 4.

[81] Finding 3.

[82] Playtime's complaint cannot possibly be that the City Council intended to prevent children from seeing these films, because theatres do not allow children to see X-rated movies, which is all these theatres offer.

[83] *See also Metromedia, Inc.* v. *City of San Diego*, 453 U.S. 490, 507-512 (1981) (plurality opinion) (city has substantial interest in urban aesthetics); *Berman* v. *Parker*, 348 U.S. 26, 32-33 (1954) (among other things, zoning can promote "morality"); *Paris Adult Theatre I* v. *Slaton*, 413 U.S. at 58 (citizens have legitimate interest in protecting the "quality of life" and "the total community environment"); Wilson, *The Urban Unease: Community vs. City*, 12 Public Interest 25 (1968); *cf.* L. Tribe, *American Constitutional Law* § 12-19, at 677-679 (1978).

Moreover, because the choice of where to make a home and raise one's family is one of the most important decisions individuals face,[84] the kinds of concerns put forth here by Renton are *precisely* the kind that a small community can and should properly address.[85]

It would be ironic indeed if a city could zone adult theatres because of considerations such as the lowering of commercial and residential property values and an increase in crime, and not on the ground that these theatres have an unstable and debilitating effect on the children and families living in those same areas. Such a result would elevate property values above human values. The stability and cohesiveness of families, and parents' efforts to raise their children in suitable surroundings free from crime and blighted areas, are also worthy of protection. If a city can use its police powers to advance aesthetic values,[86] it can surely protect the even more basic human values advanced by Renton.

In light of the compelling state interest in zoning and the resulting incidental impact on First Amendment rights occasioned by this ordinance, the Court should not examine legislative intent. If legislative motivation is subject to review, the focus of the inquiry should be on the presence of legitimate motives, rather than a search for an improper one. In any event, the Renton City Council's reasons for enacting its ordinance clearly withstand scrutiny.

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[84] *See, e.g., Linmark Assocs., Inc.*, 431 U.S. at 96.

[85] As this Court noted in *Ginsberg* v. *New York*, 390 U.S. 629, 639-641 (1968):

> The well-being of its children is of course a subject within the State's constitutional power to regulate * * *.
>
> In *Prince* v. *Massachusetts, supra* [321 U.S. 158 (1944)], at 165, this Court, too, recognized that the State has an interest "to protect the welfare of children" and to see that they are "safeguarded from abuses" which might prevent their "growth into free and independent well-developed men and citizens."

[86] *E.g., Members of the City Council* v. *Taxpayers for Vincent*, 104 S. Ct. 2118, 2129 (1984).



## CONCLUSION

We are dealing in this case with very *practical* problems. As noted in our Jurisdictional Statement, cities and towns across the country have struggled since *Young* to regulate the location of adult entertainment establishments within their borders. Only a few of these zoning ordinances have been upheld—in fact, only one federal Circuit has sustained the validity of a *Young*-style adult theatre ordinance on the merits.[87]

As Renton's City Council saw it, the influx into the City of adult theatres was inevitable, not only because these theatres were already located in other Washington cities and towns but because, as one *amicus* has put it, "[a]s a result of the growth of the adult business industry, together with the adoption of zoning ordinances regulating adult businesses in larger cities, many adult businesses are relocating in these smaller adjacent cities." [88] Renton attempted to deal with this potential problem in advance, and in an even-handed fashion, without regard to the location of particular theatres or the content of particular films.

The City did not designate the smallest possible area it thought was constitutionally mandatory. In terms of size and accessibility, its set-aside zone was far more commodious than the bare minimum necessary for First Amendment purposes. The ordinance was ingenius in its effect, because it kept adult theatres away from the family-oriented areas of the City where they would have the undesirable secondary effects that the City was attempting to avoid, while still creating a large, accessible area where patrons could go to view adult films. In other words, the City did not simply set aside an arbitrary zone which might or might not have resulted in adult theatres

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[87] *Genusa* v. *City of Peoria, supra.*

[88] Brief *Amicus Curiae* of City of Whittier, *et al.*, in support of Jurisdictional Statement, at 4-5.

being contiguous to schools, businesses, and the like; instead, the City established the proper distance from the areas it was seeking to protect, and these restrictions in turn created the zone where such theatres might locate.[89]

In view of the fact that Renton's zoning efforts did not diminish the exercise of free expression, its ordinance—which is even less restrictive than that approved in *Young*[90]—should be upheld.

Respectfully submitted,

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[89] In essence, the Renton's ordinance is no more than a reasonable time, place and manner restriction of the type approved in other cases. *See, e.g., Clark* v. *Community for Creative Non-Violence*, 104 S. Ct. 3065, 3071-72 & n.8 (1984); *Heffron* v. *International Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640, 647-648 (1981); *Consolidated Edison Co. of New York, Inc.* v. *Public Service Comm'n*, 447 U.S. 530, 535-536 (1980); *see also Young*, 427 U.S. at 63.

[90] Renton's requirement of continuous exhibition and "appeal to a prurient interest" precludes regulation of any incidental or innocent exhibition of sexually explicit material. Its ordinance therefore satisfies the concerns expressed by Justice Blackmun in his dissenting opinion in *Young*, 427 U.S. at 88-96.